Office-Supreme Court, U.S.
FILED
MAY 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1268

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a public body corporate, *et al.*,

Petitioners,

v.

ROBERT L. DOWELL and VIVIAN C. DOWELL, Infants, by A. L. DOWELL, their Father and Next Friend, EDWINA HOUSTON HELTON, a minor, by the Mother, Gloria Burse, and GARY RUSSELL, a minor, by his Father, George Russell,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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May 1967

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BRIEF FOR RESPONDENTS IN OPPOSITION

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There were two opinions of the District Court. The first (R. 50-82) is reported at 219 F.Supp. 427. The second (R. 147-165) is reported at 244 F.Supp. 971. The opinion of the Court of Appeals is unreported and is printed in Appendix A of the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §1983 providing a right of relief in equity for violations of constitutional rights. These are set forth in Appendix C of the Petition.

Question Presented

Whether after finding that a school system was still legally segregated contrary to *Brown* v. *Board of Education* and that the school board refused to undertake an effective program of desegregation, it was within the power of a district court to order an independent expert study of the school system to be made and then to order the school board to adopt the recommendations of the expert panel of minimum components of an adequate plan of desegregation.

Statement*

This is a class action suit by Negro students against the Oklahoma City Board of Education and its agents to enjoin them "from continuing to enforce rules, regulations, and procedures which affect and result in the maintenance of segregated schools in Oklahoma City, . . . from assigning plaintiffs and the members of the class they represent to racially segregated schools, . . . and from refusing to adopt and execute plans to eliminate existing patterns of racial segregation in the public schools of Oklahoma City" (R. 39-41). The district court granted the requested relief in two opinions and orders, the first on July 11, 1963 (R. 50-82), and the second on September 7, 1965 (R. 147-165). The latter order requires the board of education to develop and institute an effective plan of desegregation and specifies certain minimum components of an adequate plan. The board appealed this order to the United States Court of Appeals for the Tenth Circuit, which affirmed the order except for one provision in an opinion on January 23, 1967, rehearing denied March 15, 1967. The board of education now seeks review of this judgment on certiorari.

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* This brief in opposition is longer than is usual because the issues depend, to a great extent, on the evidence, and the petition contains an incomplete statement of the facts and proceedings.

I. Legal Segregation in Oklahoma City Public Schools and Practices Which Continued Segregation, from 1907 to Date of District Court's Order.

A. *Legal Segregation in Oklahoma City.*

For nearly fifty years, from the time of its admission into the Union in 1907, the State of Oklahoma maintained legally required segregation of Negro and white students in public education as well as segregation of the races in other public activities (R. 56). The Constitution of Oklahoma, Article XIII, Section 3, provided: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained" (R. 56).

This state constitutional requirement was implemented by laws (Title 70, Oklahoma Statutes, Sections 5-1 through 5-8 and 5-11), providing that (1) "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races . . ."; (2) members of each district school board must be composed exclusively of members of the majority race; (3) private educational institutions must also be completely segregated; (4) any teacher or school official who permits a child to attend a school with members of the other race is guilty of a misdemeanor; (5) any student who attends a school with members of the other race is guilty of a misdemeanor; and (6) transportation will be furnished to other districts by those districts which do not maintain schools for a particular race (R. 56-58). It is undisputed that Oklahoma did in fact maintain the completely segregated educational system required by its laws for nearly fifty years, until the time of the second *Brown* decision in 1955.

In addition to the laws requiring segregation in all major public activities of the State, the district court found that residential segregation was customary and legally supported by statute and court enforcement in Oklahoma over a long period of time:

> [W]hen new additions were added to the cities and towns in Oklahoma, it was generally the practice of the developers to provide in the plats restrictive covenants on lands used for new homes or dwelling places, prohibiting the sale of lands or lots or the ownership by persons of the Negro race. These restrictive covenants also generally provided some penalty for an attempt to violate them. In the case where lands or lots were sold at a tax sale in Oklahoma, these restrictive covenants survive the sale (68 O.S.A. Section 456) (R. 58).

The district court also found that this general state practice of residential segregation with its supporting legal structure existed in Oklahoma City:

> The residential pattern of the white and Negro people in the Oklahoma City school district has been set by law for the period in excess of fifty years, and residential pattern has much to do with the segregation of the races. . . . The east and southeast portion of the original city of Oklahoma City was Negro, and all other sections and districts of the original city of Oklahoma City were occupied by the white race. Thus the schools for Negroes have been centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the city (R. 59).

B. *Practices Which Continued Segregation in the Public Schools After 1955—Zoning, Transfer Policies, and Faculty Assignments.*

As a response to this Court's decision in *Brown* v. *Board of Education,* the Oklahoma City Board of Education adopted the following policy statement:

> *Statement Concerning Integration Oklahoma Public Schools 1955-1956*
>
> August 1, 1955
>
> All will recognize the difficulties the Board of Education has met in complying with the recent pronouncement of the United States Supreme Court in regard to discontinuing separate schools for white and Negro children. The Board of Education asks the cooperation and patience of our citizens in its compliance with the law and making the changes that are necessary and advisable. This action requires the Oklahoma Board of Education to change a system which has been in effect for centuries and which is desired for many of our citizens.
>
> Boundaries have been established for all schools. These boundaries are shown on a map at the City Administration Building and maps are being distributed to each school principal. These new boundaries conform to the policies always followed in establishing school boundaries. They consider natural geographical boundaries, such as major traffic streets, railroads, the river, etc. They consider the capacity of the school. Any child may continue in the school where he has been attending until graduation from that school. Requests for transfers may be made and each one shall be considered on its merits and within the respective capacity of the buildings (R. 60).

Thus the board of education, as compliance with the *Brown* decision, undertook only to redraw school boundaries to eliminate obvious duality of zones based on race. Certain new school boundaries were established (R. 61). The formerly Negro Douglass High School and related Negro "feeder" elementary schools in the east central area of Oklahoma City were zoned in such a way as to remain predominantly Negro schools, relying upon patterns of residential segregation which had previously been established under the dual system. Many of the remaining white families moved out of the east central area (R. 61).

As the number of Negro families in the east central area increased, the facilities of Douglass High School were enlarged considerably through the use of temporary or portable classrooms until an enrollment of 1,820, the largest in the school system, was reached—while Northeast High School (in an adjacent white area) continued at an enrollment of 1,215 students without any temporary or portable facilities (R. 68, 74). This arrangement was in lieu of a re-zoning which would have distributed students more evenly among the various high schools, but which would have lessened the amount of racial segregation.

With respect to the assignment of high school students from dependent school districts (those without high schools) outside the city to high schools within the city, school officials continued their policy of assigning Negroes to "Negro" schools and whites to "white" schools (R. 64). Negro plaintiff Robert Dowell was automatically assigned to all-Negro Douglass High School when he sought admission to the Oklahoma City high schools from outside the city (R. 63-64).

The effects of the relatively small amount of integration which necessarily took place because of the consolida-

tion and elimination of dual school zones were counteracted, the district court found (R. 79), by the board of education's "minority to majority" transfer policy which was maintained through 1963 until invalidated under *Goss* v. *Board of Education of City of Knoxville,* 373 U.S. 683 (1963) by the original district court order. The board had theretofore followed a policy statement which provided:

> It is the policy of the school board to consider, pass upon and to practically always grant the applications of parents for the transfer of their children from schools where the children's race is in the minority to a school or schools solely of the child's race or in which the child's race is in the majority providing that transfers under policy last above described be granted only when it is the opinion of the parents of the child and the district that such transfer is necessary for the best interest of the child as a pupil (R. 70).

The board assumed that "the best interest of the child as a pupil" was that he not be "unhappy" as a result of being in a minority racial position, and that this unhappiness was sufficiently evidenced by the parents' request to change schools (R. 66). The district court found that "the policy set forth in this resolution is the same policy the school board has followed at all times since 1955. There can be no argument but that such a policy is designed to perpetuate and encourage segregation . . ." (R. 70).

The combination of the board's zoning and transfer policies successfully limited desegregation, as is indicated by a comparison of the racial composition of individual schools for 1959-60 and 1964-65:

Total Schools	White	Negro	Integrated
1959-60	73	12	7
1964-65	81	14	12

(R. 97)

Elementary Schools	White	Negro	Integrated
1959-60	62	9	6
1964-65	67	11	9

(R. 100)

Secondary Schools	White	Negro	Integrated
1959-60	11	3	1
1964-65	14	3	3

(R. 103)

Note: The working definition of an "integrated" school used by the expert panel appointed by the district court was a school which is less than 95% white or less than 95% non-white.

Additionally, there were 13 new elementary schools in operation in 1964-65 which had not been in operation in 1959-60 (some of the old schools had been closed down or combined), and all of these were segregated—11 completely so and 2 with 99% members of one race (R. 99). There were 6 new secondary schools in operation in 1964-65 which had not been in operation in 1959-60, and 5 of these were completely all-white or all-Negro (R. 101-102). There were white high school students who lived in the all-Negro Douglass High School area but none attended Douglass in any of the years from 1954-55 through 1962-63 (R. 65).

The district court concluded in its original opinion of July 11, 1963 that "since August 1, 1955, the only integration has been in the fringe areas as between minority

Negro residential pattern and the majority white residential pattern" (R. 79), and "that evidence of gerrymandering or otherwise of maintaining separate and distinct schools for Negroes and schools for whites can be seen in a review of the testimony" (R. 77).

Racial segregation was further preserved by the board's teacher assignments since 1955. The district court found that "during the school year 1954-55 there were no Negro teachers assigned to teach white students in the white schools or white and Negro schools where the white students were predominant and the same was true for the year 1961-62 and all years in between" (R. 65). The Superintendent stated the reason for this policy, indicating his belief in the undersirability of contact between members of different races: "I have advised the Board and have concluded that nothing would be gained educationally by a desegregation of staffs and that as a matter of fact the appointment of Negro teachers in certain schools and the mixing of staffs could very well detract from the quality of the instructional program in Oklahoma City; and that there would be only one reason that I could think of for doing this, and it would not be an educational reason. It would be merely for the sake of integration . . ." (R. 76).

II. The District Court's Order Authorizing An Expert Study to Formulate an Adequate Plan for Desegregation of the Oklahoma City Public Schools.

Based on the foregoing, the district court concluded in its original opinion of July 11, 1963, that "the School Board has not acted in good faith in its efforts to integrate the Oklahoma City Public Schools, as defined and required in the *Brown* cases, as to pupils and personnel" (R. 76). This finding of lack of good faith was based primarily on

the results, described above, of the board's approach to desegregation—by which the system had remained predominantly segregated (R. 76-77). The court also noted as an element of this finding of lack of good faith, the failure of the board to engage an expert who is familiar with the particular problems raised by the duty to desegregate a school system (R. 79). The court then ordered the school board to file a comprehensive plan of desegregation (R. 82).

The school board adopted another "Policy Statement" on January 14, 1964, in response to the court's order, which stated the general purposes of the Oklahoma City public schools, the policy of attendance zones based on "neighborhood schools," certain criteria for the granting of special transfers, and the existence of opportunity for any teacher to apply for any position in the system (R. 105-108). Concluding that this policy statement would still be inadequate to achieve desegregation of the Oklahoma City public schools, the district court at the hearing on the plan on February 28, 1964, suggested that petitioner school board employ an outside expert in educational administration to analyze the problem and make proposals for an effective plan of desegregation, and that if they chose not to do so he would invite the plaintiffs to do so (R. 199-202). Petitioner school board refused to employ such an expert (R. 83-84). Respondents then moved for authority to undertake such a study (R. 87-88), which motion was granted by the court on June 1, 1964 (R. 90-91).

The experts commissioned to undertake the study were: (a) Dr. William R. Carmack, Director, Southwest Center for Human Relations Studies, The University of Oklahoma, Norman, Oklahoma. Dr. Carmack advised that personnel of the Human Relations Center under his supervision were prepared and qualified to gather information

concerning school curriculums, pupil distribution, faculty distribution, school zones, transfer procedures and other relevant facts necessary for the proper evaluation of the problem. (b) Dr. Willard B. Spaulding, Assistant Director, Coordinating Council for Higher Education, San Francisco, California. Dr. Spaulding is considered one of the outstanding educators in the nation. He has wide experience in public school administration, having served as Superintendent of Schools in Massachusetts, New Jersey and Oregon. He is a former Dean of the College of Education of the University of Illinois and Chairman of the Division of Education of Portland State College. He is the co-author of several books on education, including *The Public Administration of American Schools* and *Schools And National Defense.* (c) Dr. Earl A. McGovern, Administrative Assistant to the Superintendent of New Rochelle Schools, New Rochelle, New York. Dr. McGovern has been in school administration since 1955 and was then involved in the research and evaluation problems in the New Rochelle school system's efforts to achieve desegregation of its public schools (R. 88).

The report of the expert panel was completed and filed on January 20, 1965 (R. 123).[1]

[1] The complete report is printed in the record at R. 92-132.

III. The Expert Panel's Analysis of the Deficiencies of the School Board's Approach to Desegregation, and Their Proposals for An Adequate Plan of Desegregation.

A. *The Adequacy of the Overall Approach.*

Pursuant to order of the court the expert panel analyzed both the adequacy of the school board's approach as a whole, and that of basic elements within it. The total school population of the Oklahoma City Public Schools in 1964-65 was 73,963, with 44,019 elementary and 29,244 secondary students (R. 95-100). The percentage of white and non-white pupils has remained relatively stable over the last six years with the white population decreasing slightly from 86.4% to 83.1% while the non-white population increased from 13.6% to 16.9% (R. 95). The total number of schools in 1964-65 was 107, with 87 elementary and 20 secondary schools (R. 95-102).

With regard to the adequacy of the overall approach, they concluded: "In overview it may be said the policy statement of the Oklahoma City Board of Education is not a plan to be followed to achieve integrated public education in Oklahoma City" (R. 108). Dr. Spaulding, the member of the expert panel who took primary responsibility for the section of the report dealing with the overall approach, amplified this statement in his oral testimony. He said: "First, I would like to state that I do not consider this a plan. As I understand planning in the area of public school administration, and I think I know this quite well, a plan requires a clear statement of the goals that will be achieved. It [includes] the description of what is going to be done to achieve those goals. Thirdly, it indicates the personnel who are going to be assigned to these tasks; and fourthly, it includes a time schedule in-

dicating the steps to be accomplished at particular times, and the time in which the goal is to be reached" (R. 263).

In analyzing the board's two stated purposes of public education in Oklahoma City of (1) providing the best possible educational program for every pupil, and (2) providing equal educational opportunity for all without reference to any hereditary or environmental differences, the expert panel pointed out in their report that "equal opportunity to profit from the best possible educational programs occurs most frequently when programs are designed to meet individual differences among pupils. When such differences are found to exist in substantial numbers of cases, wise educational planning yields adaptations of programs so that all students . . . may learn from them" (R. 108). They also noted that the Oklahoma City public schools now provide programs which are adapted to a number of pupils, such as those for the physically handicapped, slow learners, youth with special social and economic problems, etc. (R. 109). Dr. Spaulding again amplified these statements in oral testimony: "It seems to me that these two statements [of purposes] are self-contradictory. If one is to provide the best possible educational program for every pupil, then one must necessarily take into account the individual differences which exist and which exist among wide numbers of students . . ." (R. 263-264).

Dr. Spaulding suggested that it is impossible to have an effective desegregation plan without considering factors of race, economic background, etc., since a system that at one time had been segregated cannot be effectively desegregated unless affirmative steps are taken (R. 270). For example, he said, "I think we recognize that in any school system which was segregated, that the location of buildings was determined by the pattern of segregation rather

than by criteria which might have been used otherwise. Obviously if one is going to have a school into which only Negroes would be assigned, it is located in an area where Negroes can be assigned to it . . . so that generally in school systems of this character, the location of individual buildings is not the same as would be found in a city which was not segregated from the beginning" (R. 270-271). He concluded that the failure to do more than simply issue a policy statement that "we no longer believe in segregated schools" would be ineffective in changing the patterns of a segregated system (R. 271-272).

Dr. McGovern, in oral testimony, noted that during the five year period of the operation of the school system which the panel studied, some small progress in terms of the number of integrated schools had been made. However, he concluded: "As we examined it, we kept turning these things over, it became more obvious that this was not anything, that this was not due to any overt action I believe on the part of the Board of Education to provide for an integrated school system" (R. 214).

B. *Transfer Policies.*

Dr. McGovern, who took primary responsibility for the section of the report dealing with transfers, pointed out that the board's present transfer policy continues to perpetuate the segregationist effects of the "minority to majority" policy which was invalidated in 1963. Up until that time there had been four or five thousand transfers annually (R. 218).

Under the present policy, a pupil who successfully transferred under the "minority to majority" policy before 1963 is allowed to remain in the school to which he transferred. Furthermore, a brother or sister of such a student may also obtain a transfer to that school under the policy

permitting transfers to make it possible for two or more members of the same family to attend the same school (R. 218, 107). Based on detailed statistical study, he also said that the "good faith" transfer criterion further provided white pupils with an effective loophole for escaping from integrated school situations (R. 220, 113). He concluded that under the board's present policy it is still possible for many parents to achieve the same results as they might have under the "minority to majority" racial transfer policy (R. 223-224).

Dr. McGovern also noted that the result of some whites getting transfers out of schools with Negroes is an ever increasing tendency of remaining whites to also attempt to transfer out (R. 221). The effects of these transfer policies in preserving and fostering segregation could not be remedied simply by ending the particular policies in question, since they have, in concert with the board's zoning policies and the residential restrictions on Negroes, caused most of the schools to become clearly identified as "white" or "Negro" schools (R. 109, 221, 298).

As a remedy for the effects of these transfer policies in perpetuating and increasing segregation, the expert panel proposed a "majority to minority" transfer policy which would turn the old "minority to majority" policy inside out (R. 115). The "majority to minority" policy would permit an elementary school pupil, if he were in a majority group, to transfer to a school in which he was in a minority. Thus if the attendance area for a school was predominantly Negro (over 50%), Negro pupils could transfer out. However, Negro pupils could transfer only to schools in which they would be in a minority, i.e., white schools (over 50%) (R. 115). The report said: "Admittedly, due to present circumstances, it is not likely that many white pupils would take advantage of this policy,

but it would provide Negro pupils—especially those who care enough—with a way for escaping from the restrictions of the present neighborhood school plan" (R. 115). In support of this proposal as a workable means of helping to remedy the past effects of segregation within the confines of the present school system, the report emphasized the considerable amount of excess capacity available, particularly in the elementary schools (R. 116).[2]

In amplifying this recommendation in oral testimony, Dr. McGovern noted that the panel had carefully considered the capacity of the various schools in the system. It was for this reason that they avoided an open enrollment or free transfer plan where everybody could just go to the school they wished (R. 230). It was pointed out by Dr. Carmack that "this is not a plan that completely ignores attendance boundaries or the so-called neighborhood concept. This is in fact in relation to some other plans that are being utilized, a relatively modest plan" (R. 297). Dr. McGovern said that the basis for this plan was essentially what is being done in his own city (R. 227).

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[2] Excluding three elementary schools for which no data was available, in 1964-65 the total capacity of the remaining 84 elementary schools was 54,973 pupils, while the enrollment was 43,752—leaving space available for 11,221 pupils (R. 103). The 63 all white schools had room for 8,928 additional pupils, and the 6 schools with a majority of white pupils had room for 1,137 additional pupils—or a total of 10,065 additional pupils. Forty-five of these 69 schools had room for 100-plus pupils (R. 104). The elementary schools with all or a majority of non-white pupils had room for 1,156 additional pupils (R. 104).

Excluding three secondary schools for which no data was available, in 1964-65, the total capacity of the remaining 20 secondary schools was 31,936 pupils, while the enrollment was 29,774—leaving space available for 2,162 additional pupils (R. 104). The 13 all white secondary schools had room for 262 additional pupils, and the 4 secondary schools with a majority of white pupils had room for 759 additional pupils—or a total of 1,021 additional pupils. Six of these 17 schools had room for 100-plus additional pupils (R. 104). The secondary schools with all or a majority of non-white pupils had room for 1,141 additional pupils (R. 105).

In his testimony, Dr. Carmack suggested an additional effect of a "majority to minority" transfer policy: "If there [were] no attendance boundaries in Oklahoma City where one could go without anticipating the probabilities of some Negroes in the adjacent schools, the efforts to move one's residence would be minimized." This would not only help in counteracting the already existing identification of most schools in the system as "Negro" or "white" schools, but help prevent the long range effects of the board's past policies from producing more racially designated schools in the future (R. 298).

Dr. Carmack emphasized that at the same time the proposed transfer policy was reasonable and fair in that it takes into account not only the need to give substantive relief to respondents, but also the concept of freedom of choice. Thus those who do not wish to take advantage of a different kind of educational environment do not have to do so (R. 298). He clearly distinguished this proposal from those which provide for compulsory transportation across zones without regard to the desires of the students involved—this is a completely voluntary plan (R. 298). The Oklahoma City school system does not provide transportation for pupils, and would not be required to do so under the proposed plan (R. 164, 336).

C. *Zoning and Attendance Areas.*

As indicated above, the expert panel determined that the location of buildings and related zoning in the segregated system was designed to facilitate segregation (R. 270-271). Even after the abolition of an explicit set of dual zones, the panel concluded that the board's zoning policies continued to serve to contain Negroes, and the few whites who do not wish or cannot afford to move, in present predominantly Negro attendance areas or in

new ones established under those policies (R. 109). These effects were re-inforced by the board's transfer policies, which encouraged those in the racial minority in any particular zone to transfer out and cause the zone to become even more clearly racially identified (R. 221). If progress toward desegregation of schools is to be achieved, the panel concluded, the racial composition of schools must be considered in determining the boundaries of attendance areas (R. 109).

Dr. Spaulding, amplifying the report in his testimony, noted the confusion which has arisen around the use of the term "neighborhood school." He pointed out that the term "neighborhood" as used in the study of people is a sociological term which indicates a group of people having certain kinds of relations with each other. However, schools are not generally designed for this kind of a neighborhood, but the boundaries are drawn in order to get enough students inside the schools to fill them and to operate them effectively, i.e., in terms of density of population, size of buildings, etc. (R. 265). It is probably not proper to attach to these zones the word "neighborhood" which has emotional connotations which suggest that these people are already related to each other and all know each other, etc. (R. 264-265).

The expert panel recognized that even if the facilities planning and related zoning for the school system had been designed for segregation, the panel must work within the confines of the existing school facilities (R. 239-243). After analysis of the entire system, the panel concluded that although the all-Negro schools in the traditionally Negro area of the city could not be re-zoned so as to desegregate them, the same policies which had made these schools "Negro" schools were in the process of making some other schools "Negro" schools, and these other

school zones could be more easily changed (R. 117-120, 237-238).

The expert panel's report therefore recommended that two sets of adjacent school districts, each containing schools with grades 7-12, be combined so that one school in each combined district would house grades 7-9 and the other would house grades 10-12. The combination of the Harding and Northeast districts would produce a racial composition of 91% white and 9% non-white, compared to a 100% white enrollment in Harding and a 78% white enrollment in Northeast; the combination of the Classen and the Central districts would produce a racial composition of 85% white and 15% non-white, compared to a racial composition of 100% white in Classen and a racial composition of 69% white in Central (1964-65 enrollment figures) (R. 118-120).[3]

The practical problems of merging these districts were considered in detail. The traveling distance required of pupils in these merged districts would be no further than the board now requires of pupils living in the northwest section of the city who are assigned to Northwest High School (R. 239). Merger should produce no substantially different operating costs because of efficiency gains (R. 240). Furthermore, combining these schools would allow for a broader and richer curriculum, and would bring these high schools more nearly in line with the other high schools in the system. For example, at Northwest, there is a 12th grade class of 800 pupils, one at Grant of 600, one at Capitol Hill of 731, one at Marshall of 468, and one at Douglass of 383. The proposed merged schools presently have 12th grade classes of the following

[3] The overall non-white pupil percentage in the school system was 16.9% (R. 95).

sizes: (a) Central, 162, and Classen, 240; (b) Northeast, 212, and Harding, 288 (R. 243).

D. *Faculty Assignments.*

The expert panel noted in their report that "since a greater percentage of non-white personnel holds masters degrees than of white personnel, and since testimony of the superintendent of schools indicated no difference in quality of performance between white and non-white personnel, it is assumed that the range of individual competence among faculty has no relationship to race" (R. 93-94). They concluded, however, that integrated assignments of teaching personnel in elementary and secondary schools have been made only when the pupils in those schools were integrated, i.e. that if the pupil enrollment is all-white, so is the faculty, and similarly, if the pupil enrollment is all non-white, the faculty is all non-white (R. 95). The report said that although the general policy statement of the school board appeared to point toward impartiality in respect to employment of faculty and other personnel, nevertheless "it is somewhat too cautious to lead to further progress toward integrated faculties". (R. 110). It was noted that the school board's general policy statement is susceptible of the interpretation that Negro teachers will be assigned to schools with all-white faculties only when they are "ready" to accept Negro teachers (R. 110).

In order to avoid disrupting the existing faculty of individual schools which would occur by withdrawing most of the Negro faculty members from the Negro schools and distributing them throughout the system, the panel recommended that "a majority of the Negro teachers assigned to all white or to integrated schools should be secured by employing new teachers" (R. 114). Based on the

frequency of vacancies in the system (R. 155, 276), the panel proposed that "the Board should immediately take action that it will without reducing either the number of white or the number of non-white teachers now employed, integrate the faculty so that, by 1970, the following conditions will prevail: The ratios of whites to non-whites in, (a) the central administration of the schools, (b) non-teaching positions which are filled by certificated personnel, and (c) faculty in each school will be the same as the ratio of whites to non-whites in the whole number of certificated personnel of the Oklahoma City Public Schools. Maintaining these ratios does not imply any policy in respect to the use of race as a criterion for initial employment. To the contrary, it assumes that the superintendent will recommend for employment, and that the Board will employ, the best faculty available" (R. 114). The target date for complete integration of faculty was keyed to an annual turnover rate of approximately 15%, so that complete re-assignments could be easily accomplished within five years from the date of the report (1965) (R. 155, 276).

Dr. Carmack amplified the basis for the panel's recommendation of the ratio-result plan of faculty desegregation in his oral testimony:

> . . . if the members of the faculty who are now of a minority group are as well qualified and there is some evidence to suggest that they may be better qualified than their counterparts in the total faculty, there must be some artificial factor at work if we find them concentrated closely together, and that it might not be unreasonable to hope that if random selection were employed, eventually random distribution should occur.

> We ought to find, if we have 15% or 20% or whatever it might be of this group, and they are just as well qualified and can function as effectively as the others, we ought to find them appearing all over the system in about their ratio on the general faculty (R. 302).

Dr. Spaulding commented on the situation in the central administration:

> These tables will show also that the Negro teachers are paid on the average more than the white teachers are paid. Yet if one examines the way in which people have been placed in the central administration of the schools, one finds that only 9% of those employed in the central administration are Negroes in 1964-65; and I have some difficulty understanding how it is that if the policy is in truth being followed that the teachers with the longest experience, with the highest level of training on the average and who are paid best on the average, don't provide a higher proportion of the educational leadership of the city in the central administration (R. 268).

Dr. Spaulding also pointed out an important reason for the inclusion of specific standards in an adequate plan of faculty desegregation:

> . . . when schools are desegregated there is a tendency to dismiss Negro teachers or to reduce the number of Negro teachers employed and to fill these places with white teachers . . .
>
> One of the things that we were concerned about then is that any program of integration of faculty have safeguards which would prevent the occurrence in Oklahoma City of what has occurred elsewhere—this

has taken place in southern states—and so we were endeavoring to set up some kind of safeguard here when we suggest that the current percentage in number of white and Negro teachers be maintained (R. 290).

E. *In-Service Education of Faculty.*

The panel recommended in their report:

> . . . Since more will be involved than the acquisition of information, and since basic attitudes may, in some cases, need modification, a carefully prepared in-service educational program should be part of this plan. It will not be enough to distribute policy statements in writing. The components of the personnel training effort might include:
>
> (1) City-wide workshops may be held devoted to school integration and conducted in September before school opens. This has been done by some cities in Oklahoma and should be done in Oklahoma City. These workshops should provide for complete and full explanation of policy with reference to such matters as teacher assignment, pupil transfer and other administrative details of the desegregation program. . . . Effort should be made to allow the the participants time to discuss together, perhaps in small groups, their own concerns and reservations. They should gain the impression that the administration is committed to the successful execution of a program of real integration together with maximum educational opportunity of all children, whatever their economic or racial background. . . .
>
> (2) In addition to the workshops which will deal specifically with the Oklahoma City situation, spe-

cial seminars should be held for administrators and teams of teachers from each school in the processes and skills involved in educational leadership in a changing situation. The effort of these special, intensive seminars would be to establish in each school a few leaders who can act both as a special committee of advisors to the administration and as trainers of the other faculty members. . . . They should study the psychology of attitude formation and change (stereotyping and prejudice). They should develop some sensitivity to culture and cultural difference, with special attention to such groups within the general culture as Negroes, Indians, and Mexican-Americans. They should know something about the broad area of inter-group relations. This is only a partial and suggestive list of topics which could provide content for training seminars for administrators and selected faculty members.

(3) Spaced throughout the term, special clinics of one day, or even a half day, should be conducted by school grade level or by building for all teaching and administrative personnel. These could focus on day by day problems within the schools themselves, within the community or within patron groups. They could be planned by teams of teachers and administrators who had developed special interest in the human relations field from participating in the seminars described above. Outside consultants could be brought in from time to time.

This in-service training program would not only communicate to the personnel of the school and the community the seriousness with which the administration was approaching school integration, but it would also offer concrete help to those most directly con-

cerned, and through them, to the parents and PTA groups of the schools (R. 120-122).

Dr. Carmack amplified the basis for this recommendation in his oral testimony (R. 293-296). The panel indicated the underlying premise for this program when they said at the beginning of their report:

> The great weight of experience in school desegregation situations throughout the country indicates that social change meets less resistance when those in authority act without equivocation and hesitation. . . . Accordingly, the authors of this report believe that the Board of Education and the Superintendent of Schools in Oklahoma City should hold and communicate an affirmative view of the program of change herein outlined. By affirmative action, we mean the desire and intent to comply fully with both the spirit and the letter of constitutional provisions without an effort to minimize changes that might be desirable (R. 92).

IV. The District Court's Order Requiring an Adequate Plan of Desegregation, and Specifying Certain Minimum Components of Such a Plan Based Upon Recommendations of the Expert Panel.

After the submission of the expert panel's report on the deficiencies of the school board's approach to desegregation, and their minimum proposals for an adequate plan, the district court held another hearing in the summer of 1965. The court stated that "the crux of the problem before the Court" was whether or not the school board's "Policy Statement" of January 14, 1964, which had been analyzed by the expert panel, was sufficient to comply with the court's previous decision of July 11, 1963 re-

quiring the adoption of an effective plan of desegregation (R. 147). The court said that following the first hearing on the "Policy Statement," it was without sufficient evidence to approve or disapprove it, and for that reason requested the employment of educational administration "experts who were competent, qualified, unbiased, unprejudiced, and independent of any local sentiment, to make a survey of the problem" for the benefit of the court as well as the school system (R. 147).

In its opinion of September 7, 1965, the district court, in assessing the expert panel's report, said:

> The Report . . . concludes that the absence of an affirmative program and the maintenance of transfer policies which enable white pupils to transfer from predominantly Negro schools to predominantly white schools has greatly hindered the disestablishment of segregation in the public school system. The Report notes that teacher desegregation has taken place on only a token basis, makes several recommendations aimed at both correcting existing policies which hinder desegregation and permitting at least a meaningful beginning toward the desegregation of the school system required by the mandate of the Brown decisions.
>
> After careful study and evaluation of the Report admitted in evidence, hearing the testimony of the experts who prepared it, observing their demeanor, and noting their responses to questions posed by counsel for defendants, this Court concludes the Report was prepared by highly qualified individuals in an atmosphere of objective impartiality; that the statistics and data upon which the recommendations are based are substantially accurate, and that the recommended remedies for the continuing segregation of

the defendant school system are reasonable, workable, and educationally sound (R. 148-149).

The court concluded:

> The burden of going forward with desegregation was placed on the school boards, but the responsibility for reviewing the adequacy of desegregation and good faith compliance at the earliest practicable date, was placed on the Federal Courts, which were admonished to consider " * * * the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." The defendant Board, to comply with the Brown decisions, must thus have a plan which sets forth the steps to be taken to effectuate the transition to a school system not based on race, but based on good will.
>
> Paper compliance and policy statements are insufficient to satisfy the standards of desegregation required by the second *Brown* decision (R. 156).

* * *

> The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and the failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process (R. 151-152).

* * *

> This Court concludes that the Board has failed to desegregate the public schools in a manner so as to eliminate either the tangible elements of the segregated system, or the violation of the constitutional

rights of the plaintiffs and the members of their class, enumerated in the Brown decision.

The essential or most important point is that defendants have never prepared a plan by which progress in the desegregation process could be accurately judged either by themselves or by others. The plan submitted to this Court in January, 1964 is not a plan, but a statement of policy. School desegregation is a difficult and complicated matter, and, as the record shows, cannot be accomplished by a statement of policy (R. 152-153).

Since the school board had repeatedly refused to undertake any affirmative program to disestablish segregation, and since the expert panel's proposals for minimum components of an adequate plan of desegregation were so thoroughly supported by their qualifications and testimony, the court ordered the school board to adopt these proposals in order to provide the equitable relief required by the *Brown* decision, guaranteeing the Constitutional right to a desegregated education (R. 162-165). The court said:

> The recommendations contained in the Integration Report will permit a meaningful start to the eradication of the inequalities, based on race, still existing in the defendant school system (R. 154).

The Court also stated:

> The Court does not by this Order intend to say that the performance of the provisions of this Order will satisfy and meet the full good-faith requirements of desegregation as provided by law. Further study and action of the Board of Education should be undertaken in order for the Oklahoma City Public Schools to be further and completely desegregated as the law requires (R. 164).

V. The Opinion of the Court of Appeals.

The Board of Education appealed the order of September 7, 1965, to the Court of Appeals for the Tenth Circuit. In a 2-1 decision on January 23, 1967, the Court of Appeals upheld all elements of the district court's decree, with the exception of the requirement for in-service education of faculty. (The opinions of the majority and of the dissenting judge are printed in Appendix A of the Petition).

In a review of the evidence, the Court said: "The record reflects very little actual desegregation of the school system between 1955 and the filing of this case. During that six year period segregation of pupils in the system had only been reduced from total segregation in 1955 to 88.3 percent in 1961." The Court noted that even at the time of the filing of the expert panel's report in January 1965, about 80% of the Negro students still attended clearly segregated schools (schools which are more than 95% non-white).

The Court pointed out that inherent in the school board's argument was the claim that there was no racial discrimination in the operation of the school system. In response to this contention, it said:

> The attendance line boundaries, as pointed out by the trial judge, had the effect in some instances of locking the Negro pupils into totally segregated schools. In other attendance districts which were not totally segregated the operation of the transfer plan naturally led to a higher percentage of segregation in those schools.

In upholding the power of a United States district court to order an impartial expert survey on planning for

desegregation in the circumstances of this case, the Court held:

> We agree that in considering or reviewing acts of school boards and officials, generally, the power of a court of equity does not extend to the promulgation of rules or regulations to be adopted and followed by such boards and officials. This does not mean that when a court of equity reaches the conclusion that unconstitutional racial discrimination in a school system exists, the power of the court ends. When the trial court here made such a finding and pointed out the areas of discrimination, it was the clear duty of the school authorities to promptly pursue such measures as would correct the unconstitutional practices. . . .
>
> The trial court was clearly within its equitable powers in ordering the board to present an adequate plan for desegregation of the school system. The board presented no plan, it only reiterated its general intention to correct some of the existing unlawful practices. This was not compliance with the order of the court. It was the existence of this factual situation, due entirely to the failure and refusal of the board to act, which created the necessity for a survey of the school system by a panel of experts. Even at this point, the trial court patiently refrained from compelling such a survey but asked the board to cause a survey of the school system to be made. It was only after the board's refusal of this request that the court appointed the three experts and directed them to make a survey.

The Court then held that the inclusion of the specific proposals of the expert panel for minimum elements of

an adequate plan of desegregation in the decree of the district court was proper (with the exception noted above):

> We need not recite again the facts in this record which conclusively show that for ten years after the board enunciated its intention to abide the mandate of Brown [the board has] taken only such action as they have been compelled to take and desegregation has been only of a token nature. Under the factual situation here we have no hesitancy in sustaining the trial court's authority to compel the board to take specific action in compliance with the decree of the court so long as such compelled action can be said to be necessary for the elimination of the unconstitutional evils pointed out in the court's decree. The procedures ordered by the trial court must be viewed in light of this test.

The Court of Appeals concluded:

> Because of the refusal of the board to take prompt substantial and affirmative action after the entering of the court's decree, without further action by the court the aggrieved plaintiffs, even with a favorable decree from the court, were helpless in their efforts to protect their court-pronounced Constitutional rights. Under these circumstances it was the duty of the trial court to take appropriate action to the end that its equitable decree be made effective. Again, we go back to the second Brown case where the trial courts were directed "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

ARGUMENT

I.

The Decisions Below Are Clearly Correct.

A. *There Was Overwhelming Evidence of the Existence and Continuation of Segregation in the Oklahoma City School System.*

Without dispute the State of Oklahoma maintained absolute segregation in public education for nearly fifty years. As indicated by the statutory structure concerning segregation in public education (see Statement, *supra*) this meant that all planning concerning schools, all decisions on the location of buildings, all pupil attendance policies, all faculty assignments, etc.,—i.e. every facet of the school system—had to be designed and executed to achieve and maintain "complete" separation between the races. Thus the entire pattern of operation of the school system was directed toward segregation as an explicit and overriding goal. Many policy decisions made during the period of required segregation necessarily have long continuing effects.

In this context of fifty years' history of using all of the state's resources to segregate the school system, the school board ostensibly undertook to achieve the desegregation required by the Fourteenth Amendment by simply redrawing certain zone lines. It cannot seriously be contended that such minimal steps could undo the effects of fifty years of concentrated state effort to build a segregated school system. Because of the obvious inadequacy of such a token step to effectively desegregate the schools, and because of the deep roots of the practice of segregation in the public school system, it is not surprising that

the record shows that school board policies following 1955 generally had the effect of maintaining segregation.

Thus, as the district court found, the board zoned the previously all-Negro schools in such a way that they remained identified as Negro schools, encouraging many whites who lived in the area to move out. Furthermore, all-Negro Douglass High School was continually enlarged by temporary facilities so that nearly all Negro high school students in the city could continue to be accommodated in the "Negro" high school.

The "minority to majority" transfer policy was, of course, fundamental to continuing school segregation, where zoning was inadequate by itself. Whites assigned to formerly and still predominantly Negro schools who could not change their residences were able to transfer out; Negroes assigned to formerly all-white schools were encouraged to re-segregate themselves. The net effect was that virtually all schools in the city became clearly racially designated or identified. The existence of this policy until it was struck down by this Court in 1963[4] belies the board's asserted dedication to the "neighborhood school."

The segregationist design of the board's attendance policies is even more graphically shown by the fact that 18 of the 19 new schools opened from 1959-60 through 1964-65 were either all Negro or all white.

Faculty members were assigned to schools only with members of their own race before 1955, and after 1955 generally continued to be assigned only to schools where their race predominated, although some whites could teach in predominantly Negro schools. There is conclusive evi-

[4] *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683 (1963).

dence of perpetuation of racial segregation in faculty assignments.

There was, therefore, overwhelming evidence to support the district court's conclusion that the Oklahoma City public schools have not been desegregated. Since the school board repeatedly refused to undertake any affirmative program of desegregation, the district court, as a court of equity obligated to provide adequate relief for this existing constitutional violation, sought the assistance of independent experts in educational administration to devise minimum components of an adequate plan of desegregation.

B. *The Expert Testimony Provided a Reasonable Basis for the District Court's Order.*

The expert panel made a detailed study of the Oklahoma City school system. As detailed *supra* in the Statement the three experts were all prominent in the field of education and obviously competent to undertake this task. All of the sections of the district court's order requiring specific components of an adequate plan of desegregation are based on the report and recommendations of the expert panel.

The general conclusion of the panel was that effective desegregation of a segregated school system requires substantial affirmative action which must be planned in detail to achieve the goal. The four components of effective planning which the expert panel outlined were adopted by the district court.

Having found that the school system remained primarily segregated and that the board's policies generally have the effect of perpetuating that segregation, the expert panel then developed and recommended specific policies to implement desegregation.

The effectiveness of the past policy of "minority to majority" transfers in maintaining segregation by causing schools to become or remain racially designated, indicated that a converse "majority to minority" policy might be effective in producing desegregation. This was confirmed by an extensive analysis of the pupil composition of each school in the system, which showed that there was substantial excess capacity, particularly in the elementary schools. That the school system was able to process several thousand transfers annually under the old "minority to majority" policy showed that this proposal would not impose an undue administrative burden.

The expert panel also recommended that not only would the "majority to minority" proposal counteract the former transfer policy and the present transfer policies which continue to perpetuate the effects of the former policy, but would also counteract the effects of the board's zoning policies which have fostered segregation through following racial residential patterns and thereby encouraging increased residential segregation.

After an analysis of all of the school zones in the city, the panel concluded that while some traditionally all-Negro schools could now not be re-zoned so as to desegregate them because residential segregation had hardened, other schools which were in the process of becoming Negro schools under the same policies could be re-zoned to prevent this. They therefore recommended the consolidation of certain school zones. That this was practical as well as appropriate relief was shown by the experts' analyses of such factors as amount of travel required by pupils in the merged districts, operating costs of the merged schools, effects on curriculum, and comparison of size of the merged schools with other high schools in the system.

The expert panel very carefully considered all aspects of the problem of a remedy for faculty segregation, including qualifications of Negro and white teachers, necessity for continuity of faculty in individual schools, and annual faculty turnover rate. In accordance with general requirements for effective planning, they considered there must be some defined goal and program if faculty desegregation were eventually to be achieved. They proposed that based on the annual faculty turnover rate, that five years after the start of the plan, the ratio of whites to non-whites assigned to each school and in the central administration should be the same as the ratio of whites to non-whites in the whole number of certificated personnel in the school system. This would provide a clear standard for measuring the progress of the school system toward desegregation of faculty. It would also protect against the tendency which has developed elsewhere for desegregation of faculty to result in Negro teachers being squeezed out of the system.

II.

There Is No Conflict of Decision.

A. *The Decision of the Court of Appeals Is Clearly in Accord With Recent Major Decisions of the Other Circuits on the Implementation of Desegregation Relief in School Systems Where There Has Been Legal Segregation.*

The recent landmark school desegregation decision of the United States Court of Appeals for the Fifth Circuit, *United States et al.* v. *Jefferson County Board of Education et al.*, 372 F.2d 836 (5th Cir., 1966), re-affirmed *en banc*, Civil No. 23345, March 29, 1967, clearly agrees with the decision of the Tenth Circuit in this case in all respects, including the scope of the relief required, the

powers and duties of federal courts of equity in fashioning relief, and the specific components of the relief ordered by the district court in this case.

The Fifth Circuit clearly holds at several points that the duty of school boards which had operated dual segregated school systems is to affirmatively re-organize those systems into unitary integrated school systems. The constitutional issue in a class action suit by Negro plaintiffs against a school system concerns not the admission of the individual plaintiffs to formerly all-white schools, but the segregated operation of the *system*. The Court states that the distinction originating in *Briggs* v. *Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955) between "desegregation" and "integration" is not a meaningful one and has no basis in Supreme Court jurisprudence.[5] The Fifth Circuit's opinion extensively analyzes the case of *Bell* v. *School City of Gary, Ind.*, 324 F.2d 209 (7th Cir., 1963), *cert. denied* 379 U.S. 924, a leading Northern "de facto" segregation case denying relief, and finds it to be completely inapplicable to school systems where the segregated pattern of operation originally arose from state action.[6] Since school systems which had been legally segregated have an affirmative obligation to disestablish segregation, the Fifth Circuit holds that *"the only school*

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[5] It is to be noted that the school board in their petition cites *Kelley* v. *Board of Education of Nashville*, 270 F.2d 209 (6th Cir., 1959), *cert. denied* 361 U.S. 924, for its approval of the *Briggs* principle. This opinion, which upheld the "minority to majority" transfer policy, was completely undercut later when this Court invalidated that same policy in *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683 (1963).

[6] *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), *cert. denied* 380 U.S. 914, which follows *Gary*, also cited by the school board along with *Gary* in their petition, is similarly found to be inapplicable to the duty of a school board which had operated a legally segregated school system to disestablish that system, since the trial court found that the system had already been adequately and effectively desegregated. The Tenth Circuit itself so held in the opinion below in this case.

desegregation plan that meets constitutional standards is one that works" (emphasis in original). 372 F.2d at 847.

The Court holds in *Jefferson County* that the extensive equity power which it exercises in its decree exists independently of the Civil Rights Act of 1964 and is inherent in federal courts. Under the Court's decision the district courts are required to evaluate compliance with the constitutional requirement of desegregation by measuring actual performance—not promised performance—and may and should call upon expert assistance to aid in doing so.[7]

The Fifth Circuit devoted extensive consideration in *Jefferson County* to the United States Office of Education's *Revised Statement of Policies for School Desegregation Plans* (March 1966) implementing Title VI of the Civil Rights Act of 1964—the "H.E.W. Guidelines." It held that they were *minimum* standards for the adequacy of school desegregation plans approved by federal courts, since they generally codified past Supreme Court and Courts of Appeals decisions, and were prepared by persons of high expert qualification in the field of educational administration. Each of the requirements of the district court's order in this case has a parallel in the Guidelines.[8] The Court also specifically cites the district court's opin-

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[7] Such expert assistance may properly be given not only by the Department of Health, Education, and Welfare, but any responsible government agency or competent independent group. In appraising the adequacy of the performance of the constitutional duty to desegregate a school system, the Court holds that it is proper to use numerical percentages of the number of Negro students in desegregated schools as a yardstick and objective guide, since the constitutional test of adequacy is actual results. The Court also clearly indicates that race must be taken into account in developing and assessing adequate relief from a previous policy of improper actions on the basis of race.

[8] (1) "majority to minority" transfer policy and limitations on transfers—§181.33 HEW Guidelines; (2) consolidation of school zones—§§181.11, 181.12, and 181.32 HEW Guidelines; and (3) faculty desegregation plan—§181.13 HEW Guidelines.

ions in this *Oklahoma City* case with approval at several points in the text and in several footnotes, both for the general premises of the district court's decision and for the specific components of its decree.[9]

The Court of Appeals for the Eighth Circuit has now announced a comprehensive decree governing the desegregation process, in *Kelley* v. *The Altheimer, Arkansas Public School District No. 22 et al.*, 8th Cir., No. 18,528, April 12, 1967, which accords with the general principles and specific components of the Fifth Circuit's decision and order in *Jefferson County,* and the opinion of the Tenth Circuit in this case. The Eighth Circuit also adopted the view that the constitutional obligation to desegregate applied to the whole school *system,* and it particularly emphasized that a system could not be considered to be desegregated as long as it continued to have clearly identifiable "Negro" schools.[10] With regard to the problem of the use of facilities in the school sys-

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[9] Such citations include the district court's holdings that a school board which had previously operated a segregated system must undertake affirmative action to disestablish segregation in that system; that a board in such a situation cannot rely upon residential segregation to justify school segregation when its own past policies contributed to that residential segregation; that zoning and transfer (or attendance area) policies of such a system must be designed to maximize rather than minimize the degree of desegregation; that integration of faculty is indispensable to the adequacy of a desegregation plan; and that the ratio-result test is a proper form of faculty desegregation decree. 372 F.2d at 846, 855, 869, 876, 885, 889, 892.

[10] The Court said:

> The appellee School District will not be fully desegregated nor the appellants assured of their rights under the Constitution so long as the Martin School clearly remains identifiable as a Negro school.[11] The requirements of the Fourteenth Amendment are not satisfied by having one segregated and one desegregated school in a District. We are aware that it will be difficult to desegregate the Martin School. However, while the difficulties are perhaps largely traditional in nature, the Board of Education has taken no steps since *Brown* to attempt to change its identity from a racial to a non-racial school. Slip opinion, p. 9.

tem, the Court held that the district courts had clear power to control their use, and that on the facts of the *Kelley* case where construction of new schools was clearly planned to perpetuate segregation, the construction should have been enjoined by the district court before it took place. The Court re-emphasized the importance of faculty desegregation to the adequacy of a desegregation plan for students,[11] and after a review of this Court's and its own decisions, it held: "From these decisions, it is clear that affirmative action must be taken by the Board of Education to eliminate segregation of the faculty." Slip opinion, p. 17.[12]

The Eighth Circuit also held that the district courts have extensive responsibility for supervising in detail the carrying out of an adequate desegregation plan, and that the H.E.W. Guidelines constituted minimum components of an adequate plan of desegregation. The Court also issued its own comprehensive decree, in addition to adopting the H.E.W. Guidelines.[13] It also called specific attention

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[11] It said:

> ". . . the presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters. . . ."

It may be added, that the converse is also true, that an all-white faculty in a school attended exclusively by whites in the past denotes that school as a "white school." Slip opinion, p. 13.

[12] The Court added:

To facilitate faculty desegregation, we urge that the full understanding and cooperation of the Negro and white faculty be sought. Experience has indicated that where an effort is made to obtain such cooperation, it is given, that the task is made easier and that the results are more productive. Slip opinion, p. 17.

[13] The faculty decree provided:

The faculty shall be completely desegregated no later than the beginning of the 1969-70 school year. To this end:

(1) Vacancies at Altheimer [the "white" school] shall, when possible, be filled by the employment of qualified and competent Negro

to the Oklahoma City decree on faculty, and said: "While we impose no exact formula in this case, we call the above formula to the attention of the parties and the District Court as one which comports with Brown." Slip opinion, p. 27, fn. 24. The portion of the decree on the construction and use of facilities provided: "Any new facilities shall, consistent with the proper operation of the school system, be designed and built with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation." Slip opinion, pp. 28-29.

B. *The Decision of the Court of Appeals Is Clearly Consistent With Decisions of This Court on School Desegregation.*

This Court held from the beginning that the constitutional ban on segregation in public education required far reaching affirmative action to eliminate the practice. In the second *Brown* decision, 349 U.S. 294 (1955), it said:

> At stake is the personal interest of plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. 349 U.S. at 300.

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classroom teachers for such vacancies and, at Martin [the "Negro" school], by the employment of qualified and competent white classroom teachers for such vacancies.

(2) Immediate steps shall be taken by the appellee School District to encourage full-time white faculty members to transfer from Altheimer to Martin, and full-time Negro faculty members from Martin to Altheimer.[25] If sufficient volunteers are not forthcoming, the appellee School District shall assign a significant number of Negro classroom teachers to Altheimer for the school year 1967-68, and a larger number for the 1968-69 school year. The appellee School District shall also assign additional white classroom teachers to the Martin School for each of the above years. Slip opinion, pp. 27-28.

This Court indicated the nature of the obstacles to be overcome in the second *Brown* decision by its direction to the courts supervising the re-organization of the school systems to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300-301. This direction, combined with the injunction that desegregation was to be achieved "with all deliberate speed," revealing an expectation that completion of the process would take some time, provides as clear an indication as possible that a thorough and complete re-organization of the segregated school systems was envisioned.

That the expectation of time being required to carry out the decision was related to the extensiveness of the re-organization of the school systems envisioned, rather than to the hostility to the changes which might be anticipated, was indicated by this Court's statement that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them." 349 U.S. at 300.

This Court subsequently made a clear statement in *Cooper* v. *Aaron*, 358 U.S. 1 (1958), that the *Brown* decisions imposed an affirmative obligation on school officials of segregated dual school systems to disestablish segregation:

> State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system. 358 U.S. at 7.

Although *Cooper* itself was a case of clear and direct defiance by state officials, this Court looked forward to a time when attempts to perpetuate segregation in public education might become more subtle, when it said that the constitutional rights involved "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" 358 U.S. at 17.

Recently, in *Rogers* v. *Paul,* 382 U.S. 198 (1965), this Court re-affirmed the completeness of the reorganization of the segregated school systems suggested by the enumeration of factors in the second *Brown* decision, by holding that students in a segregated system had clear standing to challenge the racial allocation of faculty personnel. It also clearly indicated that the provision of transfers for Negro students who so desired to schools with more extensive curricula from which they had been excluded, was something substantially less than it envisioned as an adequate general plan of desegregation, since it ordered the provision of such transfers "pending" desegregation according to a general plan.

In the second *Brown* decision, this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." 349 U.S. at 300. The general equity principle is that there is no wrong without a remedy. Because of this inherent general duty to remedy a wrong, equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases. The test of the propriety of measures adopted by such a court is whether the required remedial action reasonably tends to dissipate the effects of the

condemned actions and to prevent their continuance. *Louisiana et al.* v. *United States*, 380 U.S. 145 (1965). Cf. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1943); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948).

While the initial discretion in proposing a plan of desegregation remains with the school board which administers the system, a federal court of equity obligated to provide effective relief for a constitutional wrong cannot fail to order such relief simply because the school board is unwilling to propose *any* plan which will effectively desegregate the system. The district courts were directed in the second *Brown* decision to consider the "adequacy" of all components of a proposed desegregation plan, the implication of which is that if all plans proposed by a school board are completely inadequate, the court must itself determine and order an adequate plan. Thus, in *Griffin* v. *School Board of Princ Edward County, Va.*, 377 U.S. 218 (1964), this Court ordered a public school system which had been completely closed to avoid desegregation to be reopened.

With regard to the specific components of the district court's decree, in *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683 (1963), this Court held a "minority to majority" transfer provision invalid. The basis for the decision was that the policy tended to perpetuate the pre-existing racially segregated system. However, transfer policies which would have the effect of promoting desegregation of a school system, such as the "majority to minority" policy recommended by the expert panel and

ordered adopted by the district court in this case, would stand on an entirely different footing. The United States Office of Education recognized this in its *Revised Statement of Policies for School Desegregation Plans* (March 1966) implementing Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. §2000d) when it approved such a policy: "A school system may (1) permit any student to transfer from a school where students of his race are a majority to any other school, within the system, where students of his race are a minority, or (2) assign students on such basis." *Revised Statement of Policies* §181.33(b).

With regard to the faculty decree, this Court has clearly indicated that the constitutional prohibition of segregation in education applies to faculty assignments, *Bradley* v. *School Board, City of Richmond, Va.*, 382 U.S. 103 (1965), *Rogers* v. *Paul, supra,* by pointing out the close relation between faculty allocation on a racial basis and the adequacy of desegregation plans. The courts of appeals have generally construed *Bradley* and *Rogers* as requiring that affirmative action be undertaken to eliminate the effects of previous faculty assignments on the basis of race. *United States et al.* v. *Jefferson County Board of Education, supra* (5th Cir.); *Kelley* v. *The Altheimer, Arkansas Public School District No. 22 et al., supra* (8th Cir.); *Wheeler* v. *Durham City Board of Education,* 363 F.2d 738 (4th Cir., 1966).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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